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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
DEVLIN HILLMAN,	)	
Employee	)	OEA Matter No. 1601-0100-16-AF21
	)	
v.	)	Date of Issuance: December 10, 2020
	)	
D.C. DEPARTMENT OF	)	
PARKS & RECREATION,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
	)	
_____	)	
Kemi Morten, Esq., Employee Representative	)	
Jhumur Razzaque, Esq., Agency Representative	)	

**ADDENDUM DECISION ON ATTORNEY FEES<sup>1</sup>**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On September 22, 2016, Devlin Hillman (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the District of Columbia Department of Parks and Recreation’s (“DPR” or the “Agency”) adverse action of removing him from service. Employee’s last position of record with DPR was Recreation Specialist (Lifeguard). Of note, Employee was also serving as Chief Shop Steward for American Federation of Government Employees (“AFGE”) Local 2741 at all relevant times prior to his removal from service. By notice dated August 24, 2016, Employee was served DPR’s Final Decision on Proposed Removal. Employee responded by filing a Petition for Appeal contesting that his removal was inappropriate. The parties were involved in extensive litigation and settlement talks while this matter was initially pending before the Undersigned. This process culminated in an Initial Decision (“ID”) which was issued on November 16, 2018. The ID found, *inter alia*, that Employee’s was converted from a Career Service to At-will due to his inability to become fully licensed as a Lifeguard pursuant to a change in the licensure requirements. Employee appealed this matter first to the OEA Board and then the District of Columbia Superior Court. DPR’s removal action was

<sup>1</sup> This decision was issued during the District of Columbia's COVID-19 State of Emergency.

affirmed in both tribunals. Employee then appealed to the District of Columbia Court of Appeals. On October 7, 2020, the District of Columbia Court of Appeals issued an Order granting DPR's Motion to Vacate and Remand this matter for a decision on the merits. On November 11, 2020, Employee's counsel, Kemi Morten, filed a Motion for Attorney's Fees and Costs.<sup>2</sup> DPR timely responded to Employee's Motion. Of note, a Status Conference was held on November 17, 2020, and another was scheduled for November 24, 2020.<sup>3</sup> This matter is currently pending before the Undersigned.

### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

### BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

### ISSUE

Whether Employee's motion for attorney's fees should be dismissed.

### ANALYSIS AND CONCLUSIONS OF LAW

D.C. Official Code § 1-606.08 provides that an Administrative Judge of this Office may require payment by the agency of reasonable attorney fees if the appellant is: 1) the prevailing party; and 2) payment is warranted in the interest of justice. *See also* OEA Rule 635.1, 46 D.C. Reg. at 9320. An employee is considered the "prevailing party," if he or she received "all or significant part of the relief sought" as a result of the decision.<sup>4</sup>

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<sup>2</sup> Of note, Ms. Morten formally represented Employee at the OEA. However, Employee represented himself *pro-se* when his matter was appealed to the District of Columbia Superior Court and District of Columbia Court of Appeals.

<sup>3</sup> Employee and his former counsel failed to attend this conference and the Undersigned is presently considering the explanation provided by Ms. Morten.

<sup>4</sup> *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1601-0138-88AF92 (May 13, 1993).

It is unquestioned that this matter is currently under review and a final decision has not been rendered. At this point, the question of whether Employee is a prevailing party has not been finally determined. Consequently, the motion for attorney fees is premature and must now be dismissed. However, the dismissal is without prejudice, since Employee may yet become a prevailing party. If Employee is determined to be the prevailing party, he may resubmit a motion for attorney fees to this Office.

ORDER

Based on the aforementioned, it is hereby **ORDERED** that Employee's Motion for Attorney Fees and Costs is **DISMISSED** without Prejudice.

FOR THE OFFICE:

/s/ Eric T. Robinson

ERIC T. ROBINSON, ESQ.

SENIOR ADMINISTRATIVE JUDGE